IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-129

BRITISH EUROPEAN AIRWAYS,

Petitioner,

—v.—

ABRAHAM BENJAMINS, as Personal Representative of the Estate of Hilde Benjamins, deceased, HAWKER SIDDELEY AVIATION, LTD., and HAWKER SIDDELEY GROUP, LTD.,

Respondents.

REPLY BRIEF OF PETITIONER TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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This brief is filed in reply to the Brief for the United States as *Amicus Curiae*, filed pursuant to the Court's invitation of October 2, 1978.

While conceding that

> "The issue in this case is not free from doubt, because the provisions of the Warsaw Convention are susceptible to either interpretation," [1]

the United States nevertheless argues that the petition should be denied because the decision of the court below essentially is correct. In support of this position, the United States relies principally upon (1) the views of "scholars who have reviewed the history of the Convention and the literature on it" and (2) the views of two court decisions.

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[1] Brief for the United States, p. 5

Even though the United States may take the position that the decision of the court below *is* correct, the conceded doubt as to the meaning of this treaty should be resolved by the Court at this time, one way or the other, so that the lower courts no longer will be left with the option of deciding which interpretation of Article 17 should be followed. Such option undoubtedly will lead to continuing conflicting results which ultimately can be resolved only by the Court. The case is here now. The issue is clearly presented. The meaning of a treaty of the United States of some 44 years standing is at issue. The question of whether Article 17 of the Warsaw Convention creates a cause of action for wrongful death, so as to create federal question jurisdiction under 28 U.S.C. §1331, should be resolved by the Court at this time so as to eliminate forever the doubt as to the meaning of Article 17 and in the overall interests of future judicial economy.

The rest of this reply brief will be devoted to commenting upon the inherent weakness in the position of the United States that the decision of the court below essentially is correct.

1. The United States makes the unqualified assertion that:

> The view that Article 17 establishes a right independent of domestic law is supported by scholars who have reviewed the history of the Convention and the literature on it.[2]

The Solicitor General then cites only two law review articles of such "scholars": Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497 (1967) and Calkins, *The Cause of Action*

[2] Brief for the United States, p. 9.

Under the Warsaw Convention, 26 J. Air L. & Com. 217 (1959). These articles, written respectively 33 and 25 years after the Warsaw Convention was adhered to by the United States, can hardly serve as an acceptable authoritative base for *now* construing Article 17 of the Convention in a manner contrary to the expressed understanding of the Executive Branch when the treaty was submitted to the Senate for approval in 1934, even if these "scholars" correctly concluded what the United States asserts that they did.[3]

What renders the position of the United States untenable in this regard is the fact that numerous other such "scholars" have examined the same materials and rendered diametrically opposed opinions on the issue at hand. See: *The Warsaw Convention— Does It Creat a Cause of Action*, 47 Fordham L. Rev. 366 (December, 1978); *Warsaw Convention—Wrongful Death—Right of Action*, 36 J. Air L. & Com. 372 (1970); Prominski, *Wrongful Death Actions in Aviation*, 15 U. Miami L. Rev. 59, 75 (1960); *Report on the Warsaw Convention As Amended By the Hague Protocol*, 26 J. Air L. & Com. 255, 261 (1959); Patterson and MacDonald, *Air Carrier Liability*, 3 Canadian Bar J. 297, 310-11 (1960); Wright, *The Warsaw Convention's Damages Limitations*, 6 Clev-Marshall L. Rev. 290, 295-96 (1957); Verplaetse, *Proposed Changes in the Law of Carriage by Air (The Hague Protocol, 1955)*, 3 Bus.

[3] Lowenfeld and Mendelsohn were referring to views expressed and assumed, not at Warsaw in 1929 or at Washington in 1933-34, but during the controversy concerning the continued adherence to the Convention in the 1960's in Washington. Calkins argues vehemently that the Convention was mistranslated and that *his* translations prove that the Convention was intended to create a cause of action. However, the United States concedes, in footnote 7 of its Brief, p. 8, that "[f]or the purposes of this issue here, it is not contended that the French version is materially different from the English translation."

L. Rev. 95 (1956); *Aviation—Liability Rules in the International Carriage of Passengers, Baggage or Goods By Aircraft—The Hague Protocol of 1955 to Amend the Warsaw Convention of 1929*, 34 Canadian Bar Rev. 326, 327-28 (1956); Orr, *Airplane Tort Law*, 19 Ins. Counsel J. 64, 72 (1952); Beaumont, *Some Problems Involved in Revision of the Warsaw Convention*, 16 J. Air L. & Com. 14 (1949); Orr, *The Warsaw Convention*, 31 Va. L. Rev. 423 (1945); D. Goedhuis, *National Airlegislations and the Warsaw Convention* (Martinus Nijhoff, The Hague 1937) p. 270.

Thus, the suggestion of the United States that *the* "scholars" familiar with the history of the Convention have supported the conclusion that Article 17 was intended to create a cause of action, must be sharply curtailed to mean a very tiny minority of such "scholars." Clearly, the overwhelming weight of opinion among the "scholars," as well as among the lower courts, stands in stark conflict with the decision of the court below.

2. The United States cites *Salamon* v. *Koninklijke Luchtvaart Maatschappij, N.V.*, 107 N.Y.S.2d 768 (Sup. Ct. 1951), *aff'd*, 281 App.Div. 965, 120 N.Y.S.2d 917 (1st Dept. 1953) as persuasive or existing judicial authority in support of the position that Article 17 does create a cause of action for wrongful death. *That case, however, is bracketed by decisions of the highest court of New York State reaching the exact opposite result.* See, *Wyman* v. *Pan American Airways, Inc.*, 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. 1943), *aff'd*, 267 App.Div. 947, 48 N.Y.S.2d 459 (1st Dept.), *aff'd*, 293 N.Y. 878, 59 N.E.2d 785 (1944), *cert. denied*, 324 U.S. 882 (1945); *Ross* v. *Pan American Airways*, 299 N.Y. 88, 85 N.E.2d 880 (1949); and *Rosman* v. *Trans World Airlines, Inc.*, 34 N.Y.2d 385, 314 N.E.2d 848 (1974). Thus, *Salamon* is not, and never has been, authority in New York

on this issue. These decisions of the highest court of New York are not even mentioned in the Brief for the United States when discussing *Salamon*.

3. Perhaps the most significant error in the Brief for the United States is the heavy reliance placed upon *Seth* v. *British Overseas Airways Corp.*, 329 F.2d 302 (1st Cir.), *cert. denied*, 379 U.S. 858 (1964) in support of the position that the decision below is correct. The United States contends:

> A decision of the First Circuit that does address the question [presented by the petition], however, is in accord with the decision below. In *Seth* . . . the plaintiff sued for loss of his luggage, relying on Article 18(1) of the Convention and invoking jurisdiction under 28 U.S.C. 1331. The court upheld federal question jurisdiction . . .

Brief for the United States, pages 13-14.

Seth does not even begin to address the question presented in the Petition. That case involved a claim for lost baggage and it is clear that the Convention treats such claims differently from claims for personal injury or death.[4] *Seth* did not explore or review "the history of the Convention and the literature on it." Rather, the First Circuit, in finding a cause of action for lost baggage in the Convention itself so as to confer federal question jurisdiction, relied solely upon a literal reading of one provision of the Convention, Article 30(3), which states, in pertinent part:

> (3) As regards baggage or goods, the passenger or consignor *shall have a right of action* against the first

[4] Compare Articles 17, 18, 24 and 30 and particularly paragraphs (2) and (3) of Article 30. 49 Stat. 3018-21.

> carrier, and the passenger or consignee who is entitled to delivery *shall have a right of action* against the last carrier . . .

49 Stat. 3021. (emphasis added)

Far from supporting the position of the United States, the *Seth* case may better stand for the proposition that the Convention creates a cause of action *only* where it does so explicitly.[5] The part of Article 30 that applies to personal injury or death is Article 30(2) which states, in pertinent part:

> (2) In the case of transportation of this nature, the passenger or representative can take action only against the carrier who performed the transportation . . .

Thus, it is clear that the drafters of the Convention knew the terms of art ("shall have a right of action") which can be used where the intent is to create a cause of action. Yet, the only place that these terms appear *in the entire Convention* is with reference to "baggage and goods" in Article 30(3). Therefore, the decision in *Seth* is not "in accord" with the decision below.

4. Finally, the Brief for the United States seeks to minimize the importance of the issue presented for review by arguing that there is no difference among the Circuits as to what Article 17 does mean and that, in any case, the decision below will affect "only the unusual case in which all of

[5] It is a well settled rule of statutory construction that when a law-making body has particular terms of art at hand and fails to use them, it is presumed that such action is taken deliberately. *Kyriakos* v. *Goulandris*, 151 F.2d 132 at 136-37 (2d Cir. 1945).

the parties are aliens."[6] Brief for the United States, p. 14. The fact is that all of the cases cited in the Petition have answered the *Salamon* comment that "if the Convention did not create a cause of Action in Art. 17, it is difficult to understand just what Article 17 did do," by uniformly interpreting Article 17 to create merely a presumption of liability on the part of the carrier. See Petition pages 11-15.

This interpretation, of course, is drawn from the explicit understanding of the Executive Branch as to the import of Article 17 in 1934 when seeking approval of adherence to the Convention. See, *Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules*, S. Exec. Doc. No. G, 73d Cong., 2d Sess. (1934) *reprinted in* 1934 U.S. Av. R. 239 (1934). That interpretation has been uniformly adopted by the lower courts and had come to be the settled law in this country ever since, at least until the decision of the court below. The fact is that every extant decision on the issue presented is in direct conflict with the decision of the court below.

The implicit assumption of the United States and respondent Benjamins that other Circuits will now readily adopt the new interpretation of Article 17 enunciated by the court below, representing a significant departure from the settled law, has already been refuted by the recent decision of the Court of Appeals for the Ninth Circuit in *Dunn* v. *Trans World Air Lines, Inc.*, No. 77-1649 (9th Cir. September 21, 1978), where the court stated "we find that we need not decide whether the *Benjamins* rule should be fol-

[6] Petitioner believes that the Court is sufficiently aware of the impact on federal court jurisdiction of changing the basis of thousands of suits from diversity to federal question jurisdiction. See Petition at pages 14-19.

lowed in this circuit." (Slip Opinion, at p. 6). The Ninth Circuit has always recognized the opposite rule. See, *Maugnie* v. *Campagnie Nationale Air France,* 549 F.2d 1256, 1258 n.2 (9th Cir.), *cert. denied,* 431 U.S. 974 (1977).

It is suggested that the Brief for the United States is wrong in the only arguments advanced in support of the position that the decision below is correct. However, we agree with the United States that "[t]he issue in this case is not free from doubt." Because the issue concerns the interpretation of a long-standing treaty of the United States, a conflict between the decision below and all other authoritative court decisions and the views of the Executive Branch and the vast majority of the commentators, it is respectfully suggested that this Court resolve all doubts as to the correct interpretation of the treaty by granting the petition and deciding the issue presented at this time.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this 29th day of December, 1978 served the foregoing reply to the Brief for the United States upon respondents and the United States, *amicus curiae,* by depositing same in a United States mail box at 1251 Avenue of the Americas, New York, New York 10020, with first class postage prepaid, addressed as follows:

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